Cherokee Culvert Company, Inc. *and* Construction, Production and Maintenance Workers Local Union 1210. Cases 10-CA-17346 and 10-CA-17384

March 1, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 28, 1982, Administrative Law Judge Howard I. Grossman issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's finding that Respondent did not violate Sec. 8(a)(5) and (1) of the Act by refusing to bargain over the layoff of Mitchell, we note that Mitchell's layoff did not stem from any unilateral change in Respondent's seniority system and that Respondent therefore had no duty to bargain over Mitchell's layoff. In any event Respondent had given the Union ample notice of the layoff, to which the Union did not reply until the actual date of the layoff.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge: The charge in Case 10-CA-17346 was filed on August 25, 1981, and the charge in Case 10-CA-17384 on September 2, by Construction, Production and Maintenance Workers Local Union 1210 (herein the Union). The Union filed charges in other proceedings, and various complaints issued thereafter and an order on November 9, 1981. On June 24, 1982, the Regional Director for Region 10 issued an order severing cases, in which he severed the above-captioned matters from said other proceedings on the ground that the charged party, Cherokee Culvert Company, Inc. (herein Respondent), had entered into a settlement agreement in connection with said other proceedings. The remaining allegations assert that Respondent permanently laid off employee Wash Mitchell because of his union activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (herein the Act); and unilaterally changed its policy on laying off employees by plant seniority, and refused to bargain with the Union over the layoff of Wash Mitchell, both in violation of Section 8(a)(5) and (1) of the Act. A hearing was held before me on these matters on June 28, 1982, in Macon, Georgia.

On the basis of the entire record, including briefs filed by the General Counsel, Respondent, and the Charging Party, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Georgia corporation with an office and place of business at Macon, Georgia, where it is engaged in the manufacture of corrugated steel culvert pipes. During the past calendar year, a representative period, Respondent purchased and received at its Macon, Georgia, facility goods valued in excess of $50,000 directly from suppliers located outside the State of Georgia. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

After an organizational campaign which began in March 1980, and an election conducted by the National Labor Relations Board (herein the Board), the Union was certified on May 23, 1980, as the exclusive collective-bargaining representative of Respondent's employees in a production and maintenance unit including truckdrivers, machine operators, and mechanics. The parties began bargaining on June 15, 1980, and held about 28 bargaining sessions, the last one in April 1981. On the basis of unfair labor practice charges filed by the Union, two complaints issued, and a hearing before an administrative law judge was held on July 13 and 14, 1981. His decision issued on December 11, 1981, and, on July 14, 1982, the Board affirmed the conclusions of the Administrative Law Judge, to wit, that Respondent had violated Section 8(a)(5) of the Act by refusing to provide relevant information to the Union, and Section 8(a)(1) by various acts of interference with its employees' Section 7 rights, but that it did not institute a new policy regarding employees' taking their trucks home, alleged to be violative

of Section 8(a)(3) and (5), nor did it violate that Section of the Act by collecting previously issued credit cards from the employees. Further, the Board concluded, the transfer of an employee was not unlawfully motivated in violation of Section 8(a)(3), but rather was caused by reduced work requirements and the departure of another employee. *Cherokee Culvert Company*, 262 NLRB 917 (1982).

B. *Mitchell's Work History and Union Activities*

Mitchell was hired initially in April 1972, terminated for lack of work in 1975, and rehired in May 1976. His principal work was the application of asphalt to the Company's corrugated pipe, a process which reduced corrosion and lengthened the life of the pipe.

The chief spokesman for the Union during the bargaining sessions was Business Manager Dave Crosslin. Mitchell was a member of the Union's negotiating committee together with two other employees, and attended all the bargaining sessions. Crosslin testified that Mitchell became "very vocal at times" during the negotiations, and, on one occasion, became "upset" with company attorney Sands. Company President Jarrard stated that Sands never reported this to him.

The question of whether the employees wanted their union dues deducted from their pay became an issue during the negotiations. On September 3, 1980, 16 employees, including Mitchell, signed a petition to Company President Jarrard requesting these deductions (G.C. Exh. 5). Business agent Crosslin presented the petition to attorney Sands during one of the meetings. Sands looked it over and handed it back to Crosslin, saying that it was one of the Union's "strategies." Sands reported this event to Jarrard, but did not give him the names of any of the employees on the petition.

Business Manager Crosslin testified that, in May 1981, an employee gave him a petition signed by 14 employees including Mitchell. The petition protested "any unilaterial action by the Company in trying to destroy our Collective Bargaining Agent" (G.C. Exh. 6). Crosslin testified that he sent the petition to the Company, without response, and Company President Jarrard stated that he never saw it before the day of the hearing.

As noted above, in the former proceeding it was determined that Respondent violated the Act by refusing to give relevant information to the Union. The information requested by the Union related to wage and other data pertaining to two employees. The Company conceded that it had refused to supply the information, but contended that it was justified in doing so. Respondent argued that one employee had quit and that the other had been promoted to supervisor, a defense which was not accepted by the Board. The positions of the parties were established by letters which were received at the last hearing. According to the Administrative Law Judge who conducted the hearing, Mitchell testified about this subject, but "merely" described what took place, and the positions of the parties. *Cherokee Culvert Company, supra.* Other employees testified to conversations with an agent of the Company, on the basis of which the Board concluded that Respondent had violated Section 8(a)(1) of the Act. *Id.*

C. *Mitchell's Termination*

The Company wrote Business Manager Crosslin a letter, dated August 4, 1981, notifying him that it intended to terminate Mitchell on August 19, 1981, because of lack of work (G.C. Exh. 2). Crosslin testified that he received the letter on August 11, 1981. The pleadings as amended at the hearing establish that the Company permanently laid off Mitchell on August 19, 1981. Crosslin wrote the the Company a letter dated the same day, August 19, stating his disagreement with the "discharge," and requesting that the Company bargain concerning it (G.C. Exh. 3). Jarrard testified that he knew nothing of this letter on August 19, the day Mitchell was terminated. The Union's letter was received on August 24. By letter dated August 25, 1981, Jarrard denied Crosslin's request, on the ground that it had not been made prior to termination, and that the Union had thereby waived its right to bargain (G.C. Exh. 4).

D. *Respondent's Layoff Policy*

1. Summary of the evidence

Counsel for the General Counsel argues that Respondent previously laid off employees based on seniority alone, but unilaterally altered this policy in the layoff of Mitchell. The General Counsel "concedes that the Union failed to timely request bargaining concerning the layoff," but contends that Respondent's refusal to bargain was nonetheless violative of the Act because "the layoff was effectuated pursuant to an unlawful change in the layoff policy."[1]

Company records and Jarrard's testimony establish that other employees had less seniority than Mitchell, but were retained by the Company (Resp. Exh. 20(b)). Respondent, however, contends that its actual layoff policy was based on both seniority and qualifications, not on seniority alone. This is one of the central issues of the case.

In order to establish company policy on layoffs, counsel for the General Counsel called two company officials as witnesses. Company President Jarrard was asked whether he "terminated less senior employees when there was a cutback due to lack of work." "Not necessarily," he replied. "Our policy has always been to consider seniority and . . . the qualifications of an individual." Jarrard was then asked whether he testified at the prior hearing, in July 1981, that employee Wesley (Reed) had been terminated because he was the least senior employee. "Possibly, yes," Jarrard answered. The record of the prior hearing shows that Jarrard then described Reed as the "youngest employee" at the time of termination, and that Clarence Williams, who had more seniority, was transferred into the vacancy created by Reed's departure.

In response to a leading question from counsel for the General Counsel, Plant Superintendent L. H. Justice said that layoffs were based on seniority. However, when he was later asked to "describe" company policy, Justice stated that "seniority comes first, and then the qualifications of a man taking another job." "It went by seniority

[1] G.C. Br., p. 3.

and the priority of the work that we had to do," Justice asserted. Thus, according to the plant manager, a more senior employee would not be protected from layoff if he was unable to perform necessary work in the plant.

During the bargaining sessions, in October 1980, one of the Union's proposals was that layoffs due to a reduction in the work force be based on seniority (Resp. Exh. 1). The Company countered with a proposal that "seniority shall only govern as between employees who are equally qualified in terms of ability, productivity, efficiency, attendance, physical capacity, experience, education and basic knowledge of the job" (Resp. Exh. 2(c)). The parties tentatively agreed that, in layoffs over 10 days in duration, seniority would govern "as between employees who are equally qualified in terms of ability, experience and physical fitness" (Resp. Exh. 3, sec. 7).

Business Manager Crosslin testified on this subject, but was an unsatisfactory witness. He conceded that the Union demanded seniority as the only factor, but was not responsive to questions about the Company's position. Finally, however, after denying that the Company "rejected" the Union's position, he said that Respondent was "against it because of bargaining power."

Crosslin also testified that the company position on layoffs during the bargaining was a change from its existing policy; i.e., one based solely on seniority. Company President Jarrard, however, testified to the contrary, and, as noted, stated that the layoff policy had to consider an employee's qualifications as well as his seniority. The reason, Jarrard averred, is that the Company has semiskilled employees who cannot operate its machinery.

Respondent's records show that when Mitchell was laid off in 1975, the Company retained other employees with less seniority. Jarrard testified that the reason for this was Mitchell's inability to perform the job functions of the other employees. The same type of evidence was elicited with respect to Wesley Reed, mentioned above.

2. Factual analysis

There is some support for the General Counsel's position in the testimony of Jarrard and Justice, but, in the last analysis, their evidence establishes the validity of the Company's position. Counsel for the General Counsel relies on Jarrard's admission of his testimony in the former hearing, but this is ambiguous in comparison with his other statements in the current proceeding. Similarly, Justice's testimony in response to a leading question has less probative weight than his more complete description of company policy on later examination.

Jarrard's testimony on the Company's reason for considering an employee's qualifications is inherently probable, while Crosslin's testimony is improbable. It is unlikely that the Company would voluntarily establish a layoff policy which, during a reduction in force, would require it to lay off highly skilled employees in favor of those who were semiskilled. Further, the Company's actual practice, in the 1975 layoff of Mitchell, and the 1980 layoff of Reed, shows that their qualifications as well as their seniority were considered.

The preponderance of the credible evidence, including the Company's documented position during bargaining, thus establishes that, at the time of Mitchell's termination, company policy was to base layoffs caused by a reduction in work on seniority, and also on the employee's qualifications as compared to those of other employees.

E. *Respondent's Economic Defense and Asserted Reasons for Laying Off Mitchell in 1981*

1. Summary of the evidence

Company President Jarrard credibly testified that Respondent's business is linked to the construction industry, and that its volume of business has been declining in the past several years because of an economic recession. As a consequence, according to Jarrard, the Company laid off several employees in April 1980, another in October 1980, and a secretary/receptionist in October 1981.

Jarrard further stated that the Company has experienced a particular decline in its sales of asphalt-coated pipe, because of customers' selection of the less expensive, galvanized pipe. The Company submitted a summary of its records showing a substantial decline in its purchases of asphalt, beginning in about October 1980. This tends to corroborate Jarrard's testimony about the reduction in sales of asphalt-coated pipe. Jarrard also testified that he had personal knowledge of the operation of the asphalt vat, where the coating was performed. The company president was asked about operation of the vat in 1981, "as compared to previous years," and answered that it was closed four or five times per month. Although his testimony is not entirely clear, Jarrard appeared to be saying that the vat was closed more often in 1981 than it had been in previous years.[2] This also tends to corroborate his testimony on the decline in sales of asphalt-coated pipe.

According to Jarrard, there were four employees, including Mitchell, who were working in the asphalt vat up to the summer of 1981, but the Company did not have enough work to keep all of them busy. In selecting an employee for layoff, Jarrard asserted, he considered the fact that Mitchell was the least senior of the four employees working at the asphalt vat.

There were, however, other employees in the plant who had less seniority than Mitchell. Jarrard identified these as Ernest Woodford, a welder and a truckdriver. According to the company president, Mitchell was not a welder. Jarrard considered Bobby Singleton and John Willie Curry, who were drivers with licenses to operate trucks and tractor-trailer combinations. Mitchell did not have these qualifications, according to Jarrard. Dock Curry was a "yard coordinator" who, with a forklift, moved the pipe about the yard, and loaded it in accordance with the varying gauges, in order to economize on delivery expenses. He was also responsible for maintaining inventories of the pipes in the yard. Jarrard said that

[2] The Company also introduced a calendar beginning in January 1981, with the word "closed" written in the spaces for various days of different months (Resp. Exh. 27). According to Jarrard, this was Justice's calendar, and reflected days when the asphalt vat was closed down. The Charging Party objected to Jarrard's testimony based on the exhibit, and to the exhibit itself, on various grounds. I have not relied on the exhibit, in part because it does not contain a reference to periods prior to 1980, unlike the asphalt tonnage information. However, I credit Jarrard's testimony based on his personal knowledge.

he had never seen Mitchell on a forklift, and expressed the opinion that Mitchell lacked sufficient knowledge of the pipes or the ability "to coordinate the yard." The company president testified that Mitchell appeared to be "dazed" at times, and talked to himself.

Jarrard described the work of another less senior employee, Roosevelt Curry, who made end sections on the "end section machine." This job also entailed operation of a "dimpling machine," cutting and slitting lengths of flat steel, rerolling of pipe, and knowledge of a technical manual. Jarrard said that Mitchell could take an end section off, but could not perform the entire job. Jarrard outlined the work of another less senior employee, Clarence Williams, who worked on "the spiral mill . . . the head of (the) whole operation." This job required knowledge of welding, adjustment of the machine to different gauges, and the checking of incoming shipments to make sure that theoretical and actual weights agreed. Mitchell was "absolutely not qualified" to perform this job, in Jarrard's opinion.

On cross-examination by the Charging Party, Jarrard agreed that its records showed that Mitchell had a primary classification as vat operator, and secondary classifications as operator of three machines (Resp. Exh. 29). Despite this admission, Jarrard contended that Mitchell was less qualified than other employees with only one classification. "I'm in the plant every day," he told counsel, "I see these people every day."

Counsel for the General Counsel did not introduce any evidence to rebut Jarrard's testimony, and Mitchell was not called as a witness.

The parties stipulated that Ernest Woodford, Bobby Singleton, John Willie Curry, Roosevelt Curry, and Clarence Williams were all witnesses at the prior hearing and testified adversely to Respondent, while Jarrard testified that Roosevelt Curry was a member of the negotiating committee, together with Mitchell.

2. Factual analysis

Jarrard's testimony was detailed, unrebutted, and credible. I do not consider the number of job classifications opposite Mitchell's name on Respondent's records as a contradiction of that testimony. Jarrard's testimony shows that his opinion was based in substantial part on personal observation of Mitchell. There is nothing herein to contradict this observation, since Mitchell did not appear at the hearing.

I therefore find that Jarrard's testimony accurately reflects the factors which Respondent considered in selecting Mitchell for layoff.

F. *Legal Analysis*

1. The alleged discrimination

The brief of counsel for the General Counsel notes Respondent's arguments that there is no evidence of animus toward Mitchell, and that his support of the Union was minimal in comparison with that of other employees. In response, counsel argues that (1) an employer need not discriminate against all union activists in order to establish discriminatory intent with respect to one of them, and (2) evidence of animus is not an essential element in order to prove discriminatory intention.[3] These arguments are unpersuasive in this case.

As described above, Respondent's economic reasons for reducing its employee complement are uncontested and believable. There is no question about the facts asserted by Jarrard, to wit, that the country was in an economic recession during the events herein being litigated, that the construction industry was affected, and that Respondent's business suffered a decline because of its link to the construction industry. Nor is there any doubt about the fact that the Company's sales of its more expensive, asphalt-coated pipe suffered particularly because of the recession. Equally uncontested is the fact that Mitchell worked in the asphalt-coating process.

Although Mitchell did engage in union activities, a fact known by Respondent, there is nothing in those activities to distinguish him from other employees who also engaged in such activities, against whom Respondent took no action whatever. Although Mitchell served on the union negotiating committee, so did Roosevelt Curry. Although Mitchell testified against Respondent in the last proceeding, so did other employees.[4] Indeed, their testimony established Respondent's violation of Section 8(a)(1) of the Act, whereas Mitchell's merely repeated certain uncontested facts. The fact that the Company thus took no action against other employees who engaged in similar union activity tends to indicate that its action against Mitchell was not discriminatorily motivated. *Davis Walker Steel & Wire Corp.*, 252 NLRB 311, 317–318 (1980). As a member of the union negotiating team, Mitchell was simply one of several employees, and there was nothing unique in his involvement. *Taylor-Dunn Manufacturing Co.*, 252 NLRB 719, 816 (1980). Although Mitchell signed petitions to the Company, so did the other employees.

Mitchell's service on the negotiating committee began in 1980 and ended in April 1981. Except for his perfunctory testimony at the hearing in July 1981, he engaged in no union activities between his service on the committee in April, and his layoff on August 19, 1981. This lapse in time between his union activities and the layoff also tends to indicate that the latter was not discriminatorily motivated. *Posadas de Puerto Rico Associates*, 247 NLRB 1421, 1422 (1980).

Mitchell was selected for layoff despite the fact that he had more seniority than other employees who were retained. However, the evidence shows that Respondent considered both seniority and comparative employee qualifications in making layoff selections, and that Mitchell had lesser qualifications than the employees who were retained. This is the same process which took place when Mitchell was laid off in 1975. In sum, the Company had insufficient work for all its employees, and chose to retain those who were more qualified although less senior. The Board has concluded that there is nothing unlawful in such conduct. *Fiber Materials, Inc.*, 228 NLRB 933, 940–941 (1977).

For these reasons, I conclude that the General Counsel has not established a *prima facie* case that Mitchell's

[3] G.C. Br., pp. 2–3.

[4] The complaint does not allege a violation of Sec. 8(a)(4) of the Act.

layoff was discriminatorily motivated, and, accordingly, will recommend that this allegation be dismissed.

2. The alleged 8(a)(5) violation

As noted above, the complaint alleges that Respondent violated Section 8(a)(5) of the Act by unilaterally changing its policy on layoffs, and by refusing to bargain with the Union over the layoff of Mitchell. In fact, however, the Company did not change its policy on layoffs, and this allegation is therefore without foundation.

The Company did refuse to bargain with the Union over the pending layoff of Mitchell on August 19, 1981. However, the Company notified the Union of the forthcoming layoff by letter which the Union received on August 11, 8 days before the layoff. In a case where another union received a 4-1/2-day notice of a layoff and similarly failed to respond, the Board approved of the Trial Examiner's statement that "[a] union is not entitled to stand mute after being apprised of proposed lay offs and thereafter object on the ground of a failure to bargain." *Hartmann Luggage Company*, 173 NLRB 1254, 1256 (1968). In another case where the union was silent after being notified of a proposed elimination of a unit job, the Board held that the union, "by failing to request bargaining as to the proposed changes until after they were implemented, in effect acquiesced in such changes." *The City Hospital of Liverpool, Ohio*, 234 NLRB 58, 59 (1978).[5] I therefore conclude that this allegation of the complaint is also without merit.

In accordance with my findings above, I make the following:

CONCLUSIONS OF LAW

1. Respondent Cherokee Culvert Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act, as amended.

2. Construction, Production and Maintenance Workers Local Union 1210 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not committed any unfair labor practices herein.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I hereby issue the following recommended:

ORDER[6]

The complaint is hereby dismissed in its entirety.

---

[5] See also *Smyth Manufacturing Co*, 247 NLRB 1139 (1980).

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.